JOBNAME: No Job Name PAGE: 1 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

Lucy Wong Nyuk King (f) & Anor v Hwang Mee Hiong (f)

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q-02–1398–06 OF 2012
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
21 APRIL 2014

Contract — Sale and purchase of property — Delivery of vacant possession — Sale and purchase agreement ('SPA') contained provision deeming vacant possession had already been delivered to buyer — Trial court found vacant possession had in fact not been delivered — Whether occupation of property by buyer's husband as tenant under tenancy agreement did not mean vacant possession had been given to buyer under SPA — Whether husband's occupation as tenant independent of buyer's rights under SPA

The respondent had paid the appellant a deposit upon signing a sale and purchase agreement ('the SPA') to buy the appellant's shophouse. At the material time, the respondent's husband was renting the shophouse from the appellant pursuant to a tenancy agreement. About two months after the SPA was signed a fire occurred at the shophouse making it unfit for occupation. Shortly after the incident, the respondent served a notice of termination of the SPA pursuant to cl 15 thereof and asked for the refund of the deposit. Clause 15 provided that if the property was destroyed or damaged by fire or any other cause before vacant possession of it was delivered to the respondent, the parties could unilaterally rescind the SPA whereupon the appellant should refund the deposit and all other monies the respondent had paid. The appellant contended that cl 5 of the SPA clearly stated that vacant possession was deemed to have been delivered to the respondent when the SPA was signed. This stemmed from the fact the respondent's husband was in occupation of the property pursuant to the tenancy agreement. Relying upon cl 11 of the SPA, the appellant contended that since vacant possession had been delivered, the respondent was bound to pay the balance of the purchase price and since she had not, the appellant was entitled to terminate the SPA and, inter alia, forfeit the deposit. The High Court allowed the respondent's claim and dismissed the appellant's counterclaim for damages holding that the respondent had lawfully terminated the SPA pursuant to cl 15 and that the appellant instead of accepting that termination had wrongfully sought to terminate the SPA under cl 11 with the intention of forfeiting the deposit. The High Court found as a fact that the appellant had never delivered vacant possession of the shophouse to the respondent; that the deeming provision in cl 5 was rebutted by the fact the appellant remained in possession of the property as landlord under the tenancy agreement and had not relinquished her rights over it; that the

JOBNAME: No Job Name PAGE: 2 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

respondent's husband occupied the property as tenant in his own right and not on behalf of the respondent and therefore independent of the respondent's rights under the SPA. The instant appeal was against the dismissal of the appellant's counterclaim.

Held, dismissing the appeal with costs of RM40,000 here and below:

(1) The totality of the evidence and the factual matrix of the case showed vacant possession of the shophouse was never given to the respondent and as such the respondent's reliance on cl 15 of the SPA to terminate the agreement was justified. The High Court rightly concluded that the respondent's termination was in accordance with the SPA and that she was not in breach of the agreement. The appellant, on the other hand, had wrongfully terminated the SPA and her counterclaim was rightly dismissed (see para 25).

(2) There was no error on the part of the High Court in finding that vacant possession of the property had in fact not been delivered to the respondent thereby rebutting the deeming provision in cl 5 of the SPA. This court agreed with the High Court that only a transfer or an assignment of the tenancy agreement to the respondent concurrent with the signing of the SPA would have triggered the application of the deeming provision in cl 5 and had the effect of delivering vacant possession to the respondent (see paras 21–23).

[Bahasa Malaysia summary

Responden telah membayar kepada perayu deposit apabila menandatangani perjanjian jual beli (PJB) untuk membeli rumah kedai perayu. Pada masa material, suami responden menyewa rumah kedai daripada perayu berikutan perjanjian penyewaan. Lebih kurang dua bulan selepas PJB ditandatangani kebakaran terjadi di rumah kedai membuatkannya tidak sesuai untuk diduduki. Tidak lama selepas kejadian tersebut, responden menyerahkan notis penamatan PJB berikutan klausa 15 tersebut dan meminta bayaran balik deposit tersebut. Klausa 15 memperuntukkan bahawa jika hartanah musnah atau rosak oleh kebakaran atau apa-apa punca lain sebelum milikan kosongnya diberikan kepada responden, pihak-pihak boleh secara unilateral membatalkan PJB tersebut di mana perayu patut membayar balik deposit dan kesemua wang lain yang dibayar oleh responden. Perayu berhujah bahawa klausa 5 PJB jelas menyatakan bahawa milikan kosong dianggap diberikan kepada responden apabila PJB ditandatangani. Ini berpunca daripada fakta suami responden menghuni hartanah tersebut berikutan perjanjian penyewaan tersebut. Bergantung ke atas klausa 11 PJB, perayu berhujah bahawa memandangkan milikan kosong telah diberikan, responden terikat untuk membayar baki harga belian dan memandangkan dia tidak, perayu berhak untuk menamatkan PJB tersebut dan, antara lain, kehilangan deposit. Mahkamah Tinggi membenarkan tuntutan responden dan menolak tuntutan balas perayu

JOBNAME: No Job Name PAGE: 3 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

memutuskan bahawa responden telah secara sah menamatkan PJB tersebut berikutan klausa 15 dan bahawa perayu sepatutnya menerima penamatan telah secara salah menamatkan PJB di bawah klausa 11 dengan niat untuk merampas deposit. Mahkamah Tinggi mendapati sebagai fakta bahawa perayu tidak pernah memberikan milikan kosong rumah kedai kepada responden, bahawa peruntukan dalam klausa 5 dipatahkan oleh fakta perayu kekal dalam milikan hartanah sebagai tuan rumah di bawah perjanjian penyewaan dan tidak melepaskan hak ke atasnya; bahawa suami responden menghuni hartanah sebagai penyewa dalam haknya sendiri dan bukan bagi pihak responden dan oleh itu bebas daripada hak responden di bawah PJB. Rayuan ini adalah terhadap penolakan tuntutan balas perayu.

Diputuskan, menolak rayuan dengan kos sebanyak RM40,000 di makamah ini dan bawahan:

(1) Keseluruhan keterangan dan fakta matriks kes menunjukkan milikan kosong rumah kedai tidak pernah diberikan kepada responden dan oleh itu penggantungan responden ke atas klausa 15 PJB untuk menamatkan perjanjian adalah berjustifikasi. Mahkamah Tinggi secara betul memutuskan bahawa penamatan responden adalah mengikut PJB dan dia tidak memungkiri perjanjian tersebut. Perayu, sebaliknya, telah menamatkan PJB secara salah dan tuntutan balasnya ditolak secara betul (lihat perenggan 25).

(2) Tidak terdapat kesilapan oleh Mahkamah Tinggi dalam mendapati bahawa milikan kosong hartanah sebenarnya tidak diberi kepada responden dengan itu mematahkan peruntukan dalam klausa 5 PJB. Mahkamah ini bersetuju dengan Mahkamah Tinggi bahawa hanya pindah milik atau penyerahhakan perjanjian penyewaan kepada responden selaras dengan menandatangani PJB akan mencetuskan permohonan peruntukan dalam klausa 5 dan mempunyai kesan memberikan milikan kosong kepada responden (lihat perenggan 21–23).]

Notes

For a case on delivery of vacant possession, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 6266.

Cases referred to

Azman Mahmood & Anor v SJ Securities Sdn Bhd [2012] 6 MLJ 1; [2012] 6 CLJ 573, FC (refd)

Choo Chin Thye v Concrete Engineering Products Bhd & Other Appeals [2005] 4 MLJ 14; [2005] 2 CLJ 323, CA (refd)

Appeal from: Suit No 22–9 of (BTU) (High Court, Bintulu)

JOBNAME: No Job Name PAGE: 4 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

Tai Choi Yu (Tai Choi Yu & Co) for the appellants.
Henry Ling Kuong Meng (Ling & Wong) for the respondent.

Balia Yusof JCA:

[1] The respondent who was the plaintiff in the court below filed a suit against the appellants as the defendants for specific performance or damages for breach of contract under an agreement dated 23 September 2008 for the sale and purchase of a shophouse belonging to the defendants. We will refer to the parties as what they have been referred to in the High Court below.

[2] In Suit No 22–09 of 2010 (BTU) at the Bintulu High Court, the plaintiff filed a claim against the defendants for the following reliefs:

(a) specific performance of the contract;

(b) alternatively, damages in lieu of specific performance for breach of contract with assessment of damages on the consequential loss and damage;

(c) interest at the rate of 8%pa on such damages from the date of the writ till date of full settlement or at such rate and for such period the court shall deem fit;

(d) costs; and

(e) further or other relief.

[3] The defendants filed a counterclaim and sought for the following reliefs:

(a) general damages for breach of contract;

(b) payment of RM315,000 for the loss and damages sustained by the defendants and still running;

(c) loss and damages by the plantiff lodging the private caveat on Lot 437 Block 22 Buan Land District to be assessed;

(d) Such other reliefs as the court deems fit; and

(e) costs.

[4] The facts leading to the plaintiff's claim against the defendants may be summarised as follows:

Upon the signing of the sale and purchase agreement ('the SPA'), the plaintiff paid a deposit of RM55,000 leaving a balance of RM265,000 of the RM320,000 purchase price of the said shophouse. At the material time, the plaintiff's husband was renting the said shophouse from the defendants at a

JOBNAME: No Job Name PAGE: 5 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

monthly rental of RM1,100 and the said tenancy was to expire on 31 December 2012. A

[5] It is also an undisputed fact that after the SPA was signed, the defendants have not terminated the tenancy agreement with the plaintiff's husband and the tenancy continued until the occurrence of a fire on 5 November 2008 and the shophouse became unfit for occupation. Resulting from the fire, the defendants had received RM85,000 from the insurance company as compensation for the damage caused by the fire. B

[6] On 13 November 2008, the plaintiff's solicitors served a notice of termination under cl 15 of the SPA to the defendants and requested for the return of the RM55,000 deposit. C

[7] On 19 January 2009 the defendants' solicitors in reply, wrote to the plaintiff asking the plaintiff to pay within 30 days the balance of the purchase price and on 20 March 2009 the defendants' solicitors again wrote to the plaintiff's solicitors saying 'that the agreement has been mutually terminated and annulled forthwith'. The plaintiff claims that she is ever willing and ready to perform all her contractual obligations under the SPA if the defendants are willing to make good the loss and damage to the shophouse. Hence, the suit against the defendants. D E

[8] At the conclusion of the trial, the learned judicial commissioner ('the JC') allowed the plaintiff's claims and awarded her general damages in the sum of RM85,000 with interest at 4%pa from 29 April 2010 until date of realisation and costs to be taxed unless agreed. The learned JC also ordered the plaintiff to withdraw a caveat on the said property within 14 days of the receipt of the judgment sum. As for the defendants' counterclaim, it was dismissed with costs. F G

[9] Against this decision of the learned JC, the defendants has filed two appeals to this court vide Civil Appeal No Q-02–2618 of 2010 and Civil Appeal No Q-02–1398–06 of 2012. The two appeals were heard together on 12 April 2013 at the end of which we allowed the appeal in Civil Appeal No Q-02–2618 of 2010 and the Civil Appeal No Q-02–1398–06 of 2012 was dismissed. H

[10] The defendants have since obtained leave to appeal to the Federal Court against our decision in respect of Appeal No Q-02–1398–06 of 2012. We now give our decision in respect of the said appeal. I

[11] The defendants' appeal against the decision of the JC is on the dismissal of their counterclaim against the plaintiff. In the judgment, the learned judicial

JOBNAME: No Job Name PAGE: 6 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

commissioner had found that the plaintiff had lawfully terminated the agreement vide her solicitor's letter dated 13 November 2008. In the said letter, the plaintiff's solicitors had relied on cl 15 of the SPA which reads:

> 15 PROPERTY DAMAGED BY FIRE, ETC
>
> In the event before the delivery of the vacant possession of the said Property by the Vendor(s) to the Purchaser(s), the said Property or any part thereof shall be destroyed or damaged by fire and/or any other cause(s), it is hereby expressly agreed that the parties hereto shall be entitled unilaterally to rescind this Agreement by written notice whereupon the Vendor(s) shall on demand forthwith refund to the Purchaser(s) the deposit and all whatsoever monies paid herein, free of interest, in any event not exceeding fourteen (14) days upon receipt of written notification thereof, and upon such payment this Agreement shall become null and void and neither party shall have any claim against the other.

[12] It is the contention of the defendants that by virtue of the provision in cl 5 of the SPA, vacant possession has been given to the plaintiff and upon the failure of the plaintiff to pay the balance purchase price, they are entitled to rely on cl 11 of the same to treat the contract to be mutually terminated. The plaintiff on the other hand contends that she is entitled to terminate the contract under cl 15 of the same.

[13] In giving judgment in favour of the plaintiff, the learned JC found that on the occurrence of the fire, the plaintiff not having been handed over vacant possession of the shophouse by the defendants was perfectly within her rights to terminate the agreement in reliance of the above said clause. Thus, the plaintiff's termination is not in breach of the SPA.

[14] The learned JC found that the defendants, instead of accepting the lawful termination by the plaintiff, had wrongly served a notice under cl 11 of the SPA to terminate the agreement with intention to forfeit the deposit sum of RM55,000.

[15] At p 38 of the appeal record, Vol 1 the learned JC concluded by saying:

> The Court finds that the Defendants instead of accepting the Plaintiff's lawful notice to terminate because of the fire had wrongfully served notices under Clause 11 of the Agreement to terminate the Agreement with intention to forfeit the shophouse deposit. There is no basis to support the Defendants' termination of the Agreement relying on Clause 11 and therefore the counterclaim for the Plaintiff's wrongful termination relying as clause 15 is misfounded. The Defendants by their wrongful termination under Clause 11 has breached the Agreement.

[16] For ease of reference, cl 11 of the SPA is reproduced below and it reads:

> 11. PURCHASER(S)' BREACH

JOBNAME: No Job Name PAGE: 7 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

In the event that the Purchaser(s) shall fail or refuse or be unwilling to complete the purchase in accordance with the terms and conditions herein contained, the Vendor(s) shall be at liberty to terminate this Agreement, without prejudice to their right to sue for specific performance of this Agreement, by giving to the Purchaser(s) not less than THIRTY (30) days in writing and (unless in the meanwhile the Purchaser(s) shall be ready able and willing to pay the full balance outstanding and remedy their breach of this Agreement, if any) upon expiry of the said notice this Agreement shall be deemed to have been mutually terminated and annulled forthwith and in such event —

(a) All sum or sums of which have been paid by the Purchaser(s) under this Agreement shall be forfeited by the Vendors(s);

(b) Neither party shall have any further claim against the party;

(c) Any caveat lodged by the Purchaser(s) or on their behalf against the said Property shall be forthwith withdrawn by the Purchasers at their own cost;

(d) The Vendor(s) shall be at liberty to sell the said Property to any other party as they deem fit;

(e) The Purchaser(s) shall require to re-deliver vacant possession of the said Property with it original condition to the Vendor(s) without any claims whatsoever, if the same shall have been delivered.

[17] In resolving the dispute between the parties in respect of the defendants' counterclaim, the learned JC had considered two crucial issues, namely, whether the defendants had delivered vacant possession of the shophouse and the effect of the termination of the SPA under cl 15.

[18] On the issue of vacant possession, the learned JC had found that the defendants had failed to deliver vacant possession of the shophouse to the plaintiff after the SPA was signed up to the date of the occurrence of the fire. This is beside the fact that there is a deeming provision in the SPA in cl 5 which states:

The vacant possession of the said property shall be deemed to be delivered by the Vendor(s) to the Purchaser(s) upon signing of this agreement.

[19] In arriving at the said finding, the learned JC, having considered in particular the evidence of PW2 as regards to the continuation of the tenancy after the signing of the SPA concludes that the defendants had not relinquished their rights over the shophouse. By maintaining their rights under the tenancy agreement as the landlord, the defendants remain in possession of the shophouse. This evidence of the defendants having continued to maintain possession of the shophouse through the tenancy agreement and not delivering vacant possession of the same had rebutted the deeming provision in cl 5 of the SPA.

JOBNAME: No Job Name PAGE: 8 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

[20] The continued occupation of the shophouse by PW2 (the plaintiff's husband) under the terms of the subsisting tenancy agreement with the defendants cannot be taken to mean that PW2 was occupying it on behalf of the plaintiff. PW2's occupation of the said shophouse is independent of the plaintiffs' right under the SPA.

[21] We are in agreement with the finding of the learned JC that only a transfer or an assignment of the tenancy agreement to the plaintiff concurrent with the signing of the SPA will trigger the application of the deeming provision of cl 5 and have the effect of delivering vacant possession. This is easily achieved through the literal interpretation of the said clause and giving its own natural meaning.

[22] We are of the view that the deeming provision of cl 5 of the SPA is, like any other presumption, rebuttable. The learned JC had found as a fact that the plaintiff had through the evidence of PW2 rebutted that vacant possession was delivered to her upon the signing of the SPA.

[23] It is trite law that an appellate court would very rarely interfere with primary finding of facts made by the trial court. (*Choo Chin Thye v Concrete Engineering Products Bhd & Other Appeals* [2005] 4 MLJ 14; [2005] 2 CLJ 323, *Azman Mahmood & Anor v SJ Securities Sdn Bhd* [2012] 6 MLJ 1; [2012] 6 CLJ 573). We do not find any error on the part of the learned JC in his appraisal and evaluation of the evidence. We loath to interfere.

[24] It is not strange to have a deeming provision in a contract. It is the bounden duty of the court to interpret the contract and give effect to the intention of the contracting parties. While it was submitted as the expressed intention of the parties to have the vacant possession of the shophouse be deemed transferred on the singing of the SPA, the evidence clearly pointed in the opposite direction.

[25] On the totality of the evidence and the factual matrix of the case, we found vacant possession of the said shophouse has never been given to the plaintiff and as such her reliance on cl 15 of the SPA to terminate the agreement was justified. The learned JC had rightly concluded that the plaintiff's termination relying on cl 15 was in accordance with the SPA and she was not in breach of the same. The defendants had wrongfully terminated the SPA and their counterclaim was rightly dismissed.

[26] We found no merit in the appeal and the appeal is dismissed with costs of RM40,000 here and below. Deposit to be refunded.

JOBNAME: No Job Name PAGE: 9 SESS: 5 OUTPUT: Wed Nov 26 21:09:39 2014

Appeal dismissed with costs of RM40,000 here and below.

Reported by Ashok Kumar